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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK and TRUST CO. OF CHICAGO, et al.,

Petitioner,

vs.

HAROCO, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE CITIES OF CHICAGO, NEW YORK AND PHILADELPHIA, AMICI CURIAE, SUPPORTING THE POSITION OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The Cities of Chicago, New York and Philadelphia ("the Cities") submit this brief as *amici curiae* in support of the position of the respondents. The Cities previously submitted a brief as *amici curiae* in support of the position of the petitioners in No. 84-648, *Sedima, S.P.R.L. v. Imrex Company, Inc., et al.*, which is to be argued together with this case.

These cases involve attempts to narrow the range of cases in which plaintiffs can recover civil damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 ("RICO") by requiring that plaintiff have suffered a special "racketeering injury" and (in *Sedima*) by requiring that defendants have previously been convicted of the offenses alleged to constitute a "pattern of racketeering activity."

Attempts to narrow the scope of the civil remedy provision of RICO are of special importance to local governments, including the Cities. The Cities have of course the interest of any property owner. They are also charged by local law with the institutional duty of delivering honest and efficient governmental services to their citizens. *See* Constitution of the State of Illinois (1970), Art. VII, §6; New York City Charter §394; City of Philadelphia Home Rule Charter §4-400.

In discharging these duties, the Cities are faced by special problems posed by organized schemes of tax evasion, bribery, and misuse of confidential information. These schemes cause tangible loss to municipalities (as in lost taxes or overpriced contracts) and also intangible harm

through the loss of citizen respect for the processes of government. *See* Note, *Government Corruption and Civil RICO: Providing Compensation for Intangible Losses*, 58 N.Y.U.L. Rev. 1530 (1983). The enormous amount of money administered by City agencies is of course a tempting target[1] for organized criminality; so too is a City's power to grant or withhold building permits, liquor licenses and zoning variances.[2]

Ordinary civil and criminal remedies available to penalize specific criminal acts and compensate victims are often inadequate. As the Court of Appeals pointed out in its opinion in this case, *Haroco, Inc. v. American National Bank and Trust Company of Chicago*, 747 F.2d 384, 399, n.16 (7th Cir. 1984), lawyers and courts are familiar with the fact that the delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid

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[1] The 1985 City of Chicago budget (appropriation ordinance) totals more than $1.9 billion dollars. This does not include the budgets of such separate municipal corporations as the Chicago Board of Education, the Chicago Park District, or the Chicago Transit Authority.

[2] Civil RICO cases brought by local governments involve a wide variety of fact situations. See, e.g., *City of New York v. Arnmart Wholesale Beer Distributors, Inc.*, 83 Civ. 9263 (S.D.N.Y., filed Dec. 21, 1983) (eleven beer distributors involved in frauds to evade City's excise and corporation taxes); *County of Cook v. Lynch*, 560 F. Supp. 136 (N.D. Ill. 1982) (bribery in return for real estate tax assessment reductions); *City of Chicago v. North Austin Revitalization Corp.*, No. 85 C 9441 (N.D. Ill., filed Jan. 18, 1985) (city attorney using position to allow his corporation to reap excess profits from participation in public housing rehabilitation program); *City of Milwaukee v. Hansen*, Civ. No. 77-246 (E.D. Wis., Jan. 13, 1981) (arsonists found liable for treble the City's cost of fighting fires); *City of Philadelphia v. Modern Transportation, Inc.*, 84 Civ. 2052 (E.D. Pa., settled Feb. 13, 1985) (intricate scheme to defraud City in connection with sludge removal contracts).

claims for a mere fraction of their value. Prosecution of some offenses may not be undertaken simply because prosecutors have finite resources, and the Cities, of course, have no control over decisions to prosecute.[3]

Because the Cities have found the civil RICO provision of such value in combatting organized schemes of corruption,[4] the Cities have a significant interest in the liberal interpretation of the civil RICO provisions to effectuate the purposes of Congress in enacting the statute.

SUMMARY OF ARGUMENT

Attempts to narrow the broad reach of the civil RICO provisions by conditioning a plaintiff's standing to sue on some special injury not only run counter to the plain meaning of the statute, but also run counter to the identifiable purposes of the statute.

Although in some cases the RICO provisions may create a cause of action where none existed before (and certainly create federal jurisdiction in many cases where there was none before), the greatest impact of civil RICO is in its provision of treble damages and attorneys' fees. The treble damages provision makes its impact in two ways:

[3] In Illinois, for example, responsibility for prosecution of state law felonies, including those that qualify as predicate offenses under RICO, is entrusted exclusively to the State's Attorney for each county, Ill. Rev. Stat. (1983) ch. 14, par. 5, or—in the case of federal offenses—to the United States Attorney.

[4] See cases listed in the Cities *amici* brief filed in No. 84-648 at pages 4-7.

it provides for more complete compensation for an injured plaintiff and it makes it less likely that a defendant who has engaged in a "pattern of racketeering activity" can profit from it. And while Congress in enacting RICO may have had some concern with the compensation of victims, both the text of the statute and the legislative history make it clear that Congress' primary concern was with removing the profit from acts of organized criminality.

It is in failing to recognize this primary focus that attempts to engraft special injury requirements run aground. It is not the nature of the injury that fits a case into the purpose of a RICO treble damage action, but the nature of the defendant's behavior. Congress has determined that (for example) conducting an enterprise through a pattern of racketeering activity victimizes both those directly injured and society as a whole. Such behavior should therefore be discouraged, and one effective means of discouraging it is to make it unprofitable.

It is therefore illogical to say, as the Second Circuit said in *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 517 (1984), that a person whose building is burned down by an arson for profit ring has not received a RICO injury unless his insurance is cancelled and his building burns again. This consideration bears no relationship to the acts of the defendant, who, in the hypothetical, probably has no interest at all in the status of plaintiff's insurance coverage.

It is also true that in many, perhaps most, cases a plaintiff apparently injured only by a single "predicate act" would in fact not have been injured if that act were not part of a pattern. That was true on the facts of *Bankers' Trust* itself; the frivolous lawsuits and bribery of the judge had no purpose except to cover up and preserve the pro-

fits of the bankruptcy frauds. This is not, however, a determination to be made on a case-by-case basis. Rather, it is a determination already implicitly made by Congress when it defined "pattern of racketeering activity" in the statute itself.

Consideration of the civil RICO provisions primarily from the point of view of their effect on the defendant is of course of particular interest to local governments, as plaintiffs, because of their concurrent interest in not only obtaining compensation but also deterring corrupt behavior, to the benefit both of the local government and its citizens.

ARGUMENT

This case and No. 84-648, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, together squarely present the question of who is entitled to bring a private treble damage action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968.

The plaintiffs contend, with the agreement of the Court of Appeals for the Seventh Circuit, that it is sufficient for a plaintiff to show that it was injured by an "act of racketeering" that constitutes part of a "pattern of racketeering activity" that has in turn been used in one of the ways forbidden by the Act.

Defendants, supported by the holdings of the Second Circuit, contend that a plaintiff must show something more, an injury that flows not from the predicate act, but

from the pattern itself—and perhaps also from the use of the pattern in the way specifically forbidden.

The answer to this standing question of course, lies in the intent of Congress, and one clue to Congress' intent may be found in considering the purposes for which the Act was passed. *Russello v. United States*, ____ U.S. ____, 104 S.Ct. 296, 78 L.Ed.2d 17, 26 (1983). In particular, it may be useful to look at the private civil remedy provision not from the point of view of its effect on the plaintiff, but rather from the point of view of its effect on the defendant.

Congress set forth its purpose in enacting the RICO statute in §1 of Pub. L. 91-452, 84 Stat. 922, 923 (1970). Congress declared:

> It is the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

The importance of this statement to the proper interpretation of the Act has been recognized by this Court. *Russello v. United States*, ____ U.S. ____, ____, 104 S.Ct. 296, 78 L.Ed.2d 17, 26 (1983).

One of the new strategies embodied in RICO was an emphasis on attacking the economic basis of organized crime and criminality. The Senate Report stated:

> "What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, *an attack must be made on their source of*

economic power itself, and the attack must take place on all available fronts." S. Rep. No. 91-617 p. 79 (1969) (Emphasis added).

The enlistment of private plaintiffs in the enforcement of RICO is not without precedent. To some extent, §1964(c), the section providing for a private right of action for treble damages and attorney's fees, was modeled on section 4 of the Clayton Act, 15 U.S.C. §15,[5] and adopted the potent antitrust remedies of treble damages and attorney's fees as a means of assuring RICO's effectiveness.[6]

The private treble damage action originated in the Sherman Act and served the dual purposes of enforcing the law and providing more adequate compensation for victims. The origin of this remedy was set forth by this

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[5] The relation of the two sections does not however, imply that it is proper to import into the RICO statute the kinds of special standing requirements that are sometimes found appropriate in the antitrust context. (See, e.g. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).) The difference in purpose between the antitrust laws (to encourage competition and an efficient economy) and RICO (to eliminate organized criminality and racketeering) decisively differentiate the two sections. See, e.g., the discussion in *Furman v. Cirrito*, 741 F.2d 524, 531-532 (1984) and Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101, 1111-1113 (1982).

[6] The relevant legislative history is effectively summarized in Tannenbaum and Molo, State and Local Governments' Use of the Treble Damages Remedy Under Civil RICO: A Means of Redressing the Economic Effects of Unlawful Conduct, 35 Baylor L. Rev. 1 (1983).

Court in *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486, 97 S.Ct. 690, 50 L.Ed.2d 701, 710, n.10 (1977):

> 10. Treble-damages antitrust actions were first authorized by §7 of the Sherman Act, 26 Stat. 210 (1890). The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for "[t]he people of the United States as individuals." especially consumers, 21 Cong. Rec. 1767-1768 (1890) (remarks of Sen. George); see id., at 2612 (Sens. Teller and Reagan), 2615 (Sen. Coke), 3146-3149. Treble damages were provided in part for punitive purposes, id., at 3147 (Sen. George), but also to make the remedy meaningful by counterbalancing "the difficulty of maintaining a private suit against a combination such as is described" in the Act. Id., at 2456 (Sen. Sherman).

When Congress enacted the Clayton Act in 1914, it "extend[ed] the remedy under section 7 of the Sherman Act" to persons injured by virtue of any antitrust violation. H.R. Rep. No. 627, 63d Cong. 2d Sess., 14 (1914). The initial House debates concerning provisions related to private damages actions reveal that these actions were conceived primarily as "open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered." 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb); see e.g., id., at 9079 (Rep. Volstead), 9270 (Rep. Carlin), 9414-9417, 9466-9467, 9487-9495. The House debates following the conference committee report, however, indicate that the sponsors or the bill also saw treble-damages suits as an important means of enforcing the law. Id., at 16274-16275 (Rep. Webb), 16317-16319 (Rep. Floyd). In the Senate there was virtually no discussion of the enforcement value of private actions, even though

the bill was attacked as lacking meaningful sanctions, e.g., id., at 15818-15821 (Sen. Reed), 16042-16046 (Sen. Norris).

Private enforcement of the antitrust laws [and, by extension,] of RICO provides an important supplement to the limited enforcement resources of the Department of Justice. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982), this court held that a corporation can be held liable for antitrust violations arising from the acts of its agents acting with *apparent* authority. The court reasoned that this rule is consistent with the congressional intent to encourage competition, because the threat of civil damages will provide corporations with a powerful incentive to control the actions of its agents.

Conversely, attempts by courts to narrow the availability of the private treble damage action under RICO run counter to the congressional purpose of eliminating organized criminality and racketeering by, among other things, taking the profit out of it. This is true whether the narrowing is accomplished by manipulating standing requirements or by engrafting new elements into the statute such as that the defendant be a "mobster" or a "racketeer."[7] (See, e.g., *Barr v. WUI/TAS, Inc.*, 60 F.R.D. 109 (S.D.N.Y. 1975).)

[7] Actually, it seems somewhat incongruous to hear a defendant argue that it should not be subject to a civil action under RICO because it is not a "racketeer" but a respectable business that just

(Footnote continued on following page)

Efficient private enforcement of RICO requires that all persons actually harmed by the existence of a violation of §1962 of the Act—whether the direct cause of their injury is the "pattern" of racketeering activity or one or more of the predicate acts—be drafted into the congressionally mandated war on organized criminality.

CONCLUSION

In *Crocker National Bank v. Rockwell International Corporation*, 555 F. Supp. 47, 49-50 (N.D. Cal. 1982), the court stated:

> "The key purpose of RICO's civil remedy is to divest the association of the fruits of its ill-gotten gains . . . . This purpose would be severely undermined if persons who suffered direct harm from racketeering activity . . . could not recover in the absence of a showing of some 'special' harm . . . . Such a rule would leave money derived from actions prohibited by RICO precisely where Congress did not intend it to remain, in the hands of RICO violators."

RICO's purpose focuses not on the nature of the harm to the individual victim, but on the social harm caused

[7] *continued*
happens to have engaged in a pattern of mail or bankruptcy fraud, or perhaps bribery of public officials. A defendant innocent of the predicate acts can, of course, defend itself on that basis. And the *in terrorem* effect of the treble damage action is, if not exaggerated in the first place, counterbalanced by the general difficulty of plaintiffs in recovering damages in a reasonable time and at reasonable cost. *Haroco, Inc. v. American National Bank and Trust*, 747 F.2d 384, 399, n.16 (7th Cir. 1984).

by the nature of the defendant's conduct. This purpose must not be undermined by a narrow reading of a statute that Congress has commanded be read liberally to effectuate its purpose. Pub. L. 91-452, section 904(a), 84 Stat. 947. The judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

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